IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CANDIDA STOKES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No.**
THE CITY OF MONTGOMERY,	)	**2:07-cv-686**
ARTHUR BAYLOR, Chief of Police,	)	
BOBBY BRIGHT, Mayor, in	)	
their individual	)	
and official capacities,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff's complaint contains numerous claims under Titles I and II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 *et seq.*, § 504 of the Rehabilitation Act, 29 U.S.C. § 794; Title VII of the Act of Congress known as the "Civil Rights Act of 1964," 42 U.S.C. Section 2000e *et seq.,* as amended, and the Civil Rights Act of 1991, 42 U.S.C. § 1981, §1981a., and the Family Medical Leave Act ("FMLA"), 29 U.S.C.§ 2611, *et. seq*., 42 U.S.C. 1983. Stokes filed a Motion for Summary Judgment relative only to her claim for interference under the FMLA.

Briefly, in order to prove a claim for interference with a substantive right guaranteed by the FMLA, Stokes is required to show that she was qualified for and received leave under the FMLA, and that she was capable of returning to work at the expiration of that leave. According to the Eleventh Circuit, to demonstrate a claim of interference "a plaintiff need only demonstrate that [she] was entitled to but denied the right [to return to her position or a position which was substantially equivalent]. [S]he does not have to allege that [her] employer intended to deny the right; the employer's motives are irrelevant." *Strickland* at 1208. *See also O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-54 (11th Cir.2000); *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir.1999). Accordingly, an employer may avoid liability only if it can demonstrate that it refused to provide the specific right "for a reason wholly unrelated to the FMLA leave." *Strickland* at 1208.

It is undisputed that Stokes took approved FMLA leave from December 19, 2005, which was to expire on January 19, 2006. Defendants do not challenge these material facts. In her Motion for Partial Summary Judgment, Stokes also presented evidence that at the conclusion of her FMLA leave, she was entitled to be restored to her former position or an equivalent position, but that defendants failed to so restore her. Conceding this point, defendants have presented no evidence which could create a genuine issue as to this aspect of Stokes' interference claim. Thus, defendants have not attempted to avail themselves of the only affirmative defense available to them in the context of an FMLA interference claim, which is that defendants decided to deny Stokes her right to her former position or an equivalent position based on a reason "wholly unrelated" to her FMLA leave.[1]

Instead, defendants' sole argument is that they did actually return Stokes to an equivalent position. Defendants make this argument, despite conceding that they first placed Stokes on administrative leave and then on the back desk, which is undisputedly an administrative position. Defendants' argument ignores both the law on equivalency of positions under the FMLA and the undisputed facts in this case.

The regulations define an equivalent position as one that is

> virtually identical to the employee's former position in terms of pay, benefits and working conditions, *including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority*. 29 C.F.R. 825.215(a) (italics added).

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[1]Notably, defendants have put forth no evidence to dispute the sufficiency of Stokes' treating doctor's note allowing her to return to her normal duties with no restrictions.

In setting forth the law, defendants conveniently left out the italicized portion of this definition. Defendants' Response to Plaintiff's Motion For Partial Summary Judgment, Doc. 40, p. 2. Accordingly, defendants' argument that the positions Stokes held after her FMLA leave were essentially the same as the position she held before her FMLA leave ignores that a determination of whether a position is equivalent must take into account what an employee actually did in the old position and does in the new position. 29 C.F.R. 825.215(a) and (e). See also *Donahoo v. Master Data Center*, 282 F.Supp. 2d 540 (E.D. Mich. 2003) (even though position of receipt analyst had the same pay and benefits as plaintiff's former position as conversion programmer, the positions were not equivalent in terms of status and therefore were not equivalent as a matter of law under the FMLA); *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 766 (5th Cir. 2001).[2]

Defendants argue that Stokes failed to provide "any authority to support" her claim that defendants failed restore her to the same or an equivalent position. Doc. 40, p. 3. Defendants are incorrect. Stokes provided a detailed description of her duties as a corporal in the Montgomery Police Department before her FMLA leave and her duties at the back desk after her FMLA leave. See Pl. Exh. 1,

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[2]Stokes incorporates herein the law contained in her memorandum of law in support of her partial motion for summary judgment.

Declaration of Plaintiff. Patrolling the streets in uniform with badge and gun protecting and serving the citizens of Montgomery is simply not equivalent to sitting at a back desk in civilian clothes stamping papers all day - regardless of whether the pay, hours, and benefits were the same. Stokes also presented evidence from Murphy which confirmed that she first was placed on administrative leave and that thereafter her duties were much more limited. See Pl. Exh. 2, Murphy depo. pp. 48:17- 49:9; 118:19- 119:20; 133:4 - 134:4; 135:3 - 136:3.

In response to this evidence, defendants have failed to present sufficient evidence so as to create a genuine issue of material fact on this point. That is because defendants' only evidence comes from Murphy's affidavit which simply addresses Stokes' rate of pay, benefits package, location, and working hours. Murphy's affidavit fails to address any other aspect of Stokes' positions. Affidavit of Lt. Col. Kevin J. Murphy, Doc. 40-4, Def. Exh. 3. It does not say anything, for example, about what duties Stokes performed in her position on the back desk or her position as corporal. Nor does it identify Stokes' job responsibilities. Defendants' evidence fails to address the authority associated with either position. It also fails to address the skills required to adequately perform in either position. It does not address the status of the position of corporal in the Patrol Division, as opposed to the status of a person dressed in civilian clothes without a badge working on the back desk in the police station. Thus, defendants' conclusion that the terms and conditions of Stokes' employment were "virtually identical" is not supported by any evidence or affidavits.

It is well settled that,

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading' rather its response must- by affidavits or as otherwise provided in this rule- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Federal Rule of Civil Procedure 56(e)(2). Here, defendants' failure to present sufficient evidence to demonstrate a material issue of fact as to Stokes' interference means that she is entitled to partial summary judgment on this claim.

Respectfully submitted,
/s/ Rachel L. McGinley
Deborah A. Mattison
Rachel L. McGinley
Attorneys for Plaintiff

OF COUNSEL:
WIGGINS, CHILDS, QUINN & PANTAZIS, LLC
The Kress Building
301 19th Street North

Birmingham, Alabama 35203
(205) 314-0500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 2nd day of September 2008, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Michael D. Boyle

/s/ Rachel L. McGinley